United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1213

To be argued by
PAUL VIZCARRONDO, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1213

UNITED STATES OF AMERICA,
Appellee,

—v.—

PEDRO LIND,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Pedro Lind appeals from a judgment of conviction entered on March 23, 1976, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Charles E. Stewart, United States District Judge, and a jury.

Indictment 76 Cr. 83, filed on January 22, 1976, charged Hector Luis Pereira and Pedro Lind in Count One with conspiracy to kidnap, in violation of Title 18, United States Code, Section 1201(c); in Count Two with kidnapping, in violation of Title 18, United States Code, Sections 1201(a) and 2; in Count Three with receiving and possessing ransom money, in violation of Title 18, United States Code, Sections 1202 and 2; in Count Four with transmitting in interstate commerce a communi-

cation demanding ransom, in violation of Title 18, United States Code, Sections 875(a) and 2; and in Count Five with using a firearm to commit a federal felony, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.*

Lind moved before trial to suppress certain tangible evidence and a post-arrest confession. Judge Stewart denied the motions in all respects at the conclusion of an evidentiary hearing that was held on March 3, 1976.** Trial commenced on March 16, 1976, and concluded on March 23, 1976, when, after less than one full day of deliberations, the jury found Lind guilty on all counts.

On April 26, 1976, Judge Stewart sentenced Lind to concurrent terms of imprisonment of forty years on Count One, forty years on Count Two, ten years on Count Three, twenty years on Count Four, and ten years on Count Five.

Statement of Facts

A. The Kidnapping of Kathleen Lutzen

At approximately 9:40 P.M. on the evening of January 13, 1976, Kathleen Ann Lutzen, a seventeen year old high school student, walked from her home in Paramus, New Jersey, to a nearby gas station to buy cigarettes. After making her purchase, she walked toward

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* On February 19, 1976, Pereira pled guilty to Counts One and Four. On April 26, 1976, Judge Stewart sentenced Pereira to concurrent terms of imprisonment of thirty years on Count One and twenty years on Count Four. The remaining counts were dismissed without objection from the Government.

** On March 31, 1976, Judge Stewart filed a written memorandum supplementing his oral decision with respect to the denial of the motion to suppress certain tangible evidence.

the home of a friend to deliver two pairs of blue jeans on which she had sewn patches. As she walked, a car drove up beside her and stopped (Tr. 62-65).* The car was occupied by two men she had never seen before, one in the driver's seat and the other in the front passenger seat (Tr. 65, 89). The passenger asked Miss Lutzen for directions to Manhattan, and she told him how to reach the George Washington Bridge. The man, however, seemed to have difficulty understanding her, and she had to repeat the directions several times. Suddenly, he opened the car door, pointed a gun at Miss Lutzen and pulled her into the car's back seat, where he joined her as the car drove away (Tr. 66).

The passenger told the crying girl that she was not going to be hurt; that he and his partner just wanted to get to New York; that they had just killed two persons; and that they would not hesitate to kill her if she made any wrong moves. The passenger also threatened to blow Miss Lutzen's brains out if the directions to the George Washington Bridge she was giving him were not correct (Tr. 66-67, 186). When they neared the bridge, the passenger, who by that time had climbed back into the car's front seat, told her that his gun was pointed at her and that she should lie down on the back seat and pretend she was sleeping (Tr. 67, 185). Miss Lutzen did so, and remained in that position until the car stopped in front of an apartment building. The two men took Miss Lutzen out of the car and, as the passenger instructed her to keep her head down and look at the ground, they walked her into a room on the building's main floor. Between 45 minutes and one hour had elapsed since Miss Lutzen was forced into the car; during that period, the driver said nothing to her and spoke only in Spanish to the passenger (Tr. 67-70).

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* Citations to "Tr." refer to pages in the official transcript.

In the room, the passenger asked Miss Lutzen how much money her father had. When Miss Lutzen answered that she did not know, the passenger struck her on the head with an open hand. When she began to cry, he told her to "shut up." The passenger asked Miss Lutzen if her father had $1000. Miss Lutzen answered "probably" and the passenger struck her on the head again. The questioning continued until Miss Lutzen told the passenger that she was sure her father had $2000; she also told him her name and home telephone number (Tr. 70-71).

When the interrogation ended, a towel was placed over Miss Lutzen's eyes and tied tightly around her head so she could not see; she remained blindfolded during most of the remainder of her captivity. Prior to being blindfolded, Miss Lutzen had not been able to get a very good look at either of her abductors.* The two men

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* After she was rescued, Miss Lutzen was shown two photographs of the defendant Lind by agents of the Federal Bureau of Investigation in a manner that the Government before trial conceded was impermissibly suggestive. As a result, the Government represented that it would not ask Miss Lutzen on direct examination if she could identify the defendant as one of her kidnappers. See March 15, 1976, Pretrial Conference Tr. 7-8. After cross-examination of Miss Luzen was concluded, the Government argued that the defendant had opened the door by questioning her extensively on the opportunities she had to see her abducters, and the Government should therefore be permitted to demonstrate at a hearing out of the presence of the jury that she had a basis, independent of—and not irreparably tainted by—the improper photo display, for identifying the defendant as the driver of the car. See *Simmons* v. *United States*, 390 U.S. 377 (1966). The court agreed and ordered a hearing to be held. During the hearing (at which Miss Lutzen was the only witness), it was revealed that after her rescue she was shown a third photograph, apparently not of the defendant Lind, which, as with the two photographs of Lind, she had identified as being a photograph of the driver. Primarily because of that testimony, Judge Stewart ruled that Miss Lutzen would not be permitted to make an in-court identification of the defendant Lind before the jury (Tr. 377-434).

then undressed her and forced her to perform fellatio on each of them. While she was being forced to perform fellatio on the passenger, the driver forced anal intercourse upon her (Tr. 72-74).

When the two men had satisfied themselves for the moment, the passenger told Miss Lutzen that he was going out to call her father (Tr. 74). He left the room, and from a public telephone on the street called the Lutzer home at approximately 11:00 P.M. The call woke up Warren Lutzen, Katheleen's farther, who had gone to bed shortly after his daughter stepped out. The caller asked him if he knew where his daughter was. Lutzen answered that she had gone out and, believing it to be a crank call, hung up and returned to bed (Tr. 442-43).

The passenger returned to the room. In his absence the driver had again forced Miss Lutzen to perform fellatio on him. The two men put her clothes back on her, and the passenger angrily told her that her father had hung up on him. The passenger threatened several times to shoot her, and at one point he placed a bullet in the blindfolded girl's hand, removed it, told her they were going to play "roulette," put the gun to her head, and pulled the trigger twice (Tr. 74-75). Finally, the passenger told Miss Lutzen they were going to take her to call her father, and that she should tell him she had been kidnapped by Mexican revolutionaries who would kill her if he did not pay them $2000. The girl's blindfold was removed and the driver combed her hair in her face. The two men walked her outside to a public telephone booth. The passenger tried to place a call to her father but apparently had some difficulty getting a connection, which twice caused him to hit Miss Lutzen on the head. Eventually the call went through,* and Miss

* The time of the call was approximately 1:00 A.M. on January 14, 1976 (Tr. 443).

Lutzen told her father what she had been directed to say. The passenger then grabbed the telephone, and Mr. Lutzen agreed to pay him the $2000 the next morning after the banks opened. The passenger stated he would call again at 10 A.M. the next morning (Tr. 76-78, 444-46).

The two kidnappers brought Miss Lutzen back to the room and the driver blindfolded her again. She remained in the room throughout the night. At one point she was tied to a chair and, while the passenger was out of the room, the driver attempted to force her to perform fellatio on him once more. When she resisted, he struck her on her chest with his fist, a blow hard enough to knock her and the chair over. Miss Lutzen began screaming and the two of them wrestled on the floor, until the driver stuck his hand down her throat to quiet her. Miss Lutzen bit the driver's hand hard, but began to black out before he withdrew his hand. The passenger returned to the room, sat her on the bed, and wiped her cut and bleeding mouth with what the blindfolded girl believed was a scarf she had been wearing when abducted. During Miss Lutzen's struggle with the driver, the chair to which she had been tied was broken into several pieces (Tr. 78-81).

The next morning, the passenger left the room at least three times while the driver remained with Miss Lutzen. On each occasion, the driver forced or attempted to force Miss Lutzen to perform a sexual act upon him (Tr. 83-85).*

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* During her captivity, the driver spoke in English to Miss Lutzen very few times, and primarily spoke in Spanish with the passenger (Tr. 81).

At approximately 10:30 A.M., the passenger called the Lutzen home again* and was advised by Mr. Lutzen that he had gone to the bank that morning and obtained the $2000. The passenger directed Mr. Lutzen to place the money under a taxicab that would be parked at 176th Street and Jerome Avenue in the Bronx, New York. Mr. Lutzen agreed, but before he would deliver the money he insisted on speaking with his daughter to assure himself she was all right (Tr. 450-51). The passenger returned to the room where Miss Lutzen was being held captive, removed her blindfold and pulled over her eyes a wool cap she had been wearing the night before. He then led her outside to the public telephone and called her father again. Upon receiving his daughter's assurances that she was all right, Mr. Lutzen told the passenger he would deliver the money as directed at 12:00 noon. The passenger returned with the girl to the room and waited.** After approximately 45 minutes, he asked Miss Lutzen to describe her father and his car, then told her he was going with another person to pick up the money. The driver stayed in the room, and in the passenger's absence again forced Miss Lutzen to perform sexual acts upon him (Tr. 91-97).

Unknown to the kidnappers, however, Mr. Lutzen had called the Paramus, New Jersey, Police Department after receiving the first telephone call from his daughter, and when he withdrew a total of $2000 from his savings accounts, the serial numbers of the bills had been recorded

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* The passenger apparently also called earlier that morning —at 6:20 A.M.—and asked Mr. Lutzen if he had the money yet. Mr. Lutzen repeated that he could not obtain the money until the banks opened at 9:00 A.M. (Tr. 447-49).

** When she returned to the room, the blindfold was again put in place, but this time over the wool cap that was pulled over her eyes (Tr. 95).

(Tr. 446, 449; GX 15). Thus, when at approximately 12:00 noon Mr. Lutzen placed a manila envelope containing the $2000 under a taxicab parked at 179th Street and Jerome Avenue in the Bronx, New York, he was under the surveillance of special agents of the Federal Bureau of Investigation. The "drop" completed, Mr. Lutzen returned in his car to his home in Paramus, New Jersey. Shortly after Mr. Lutzen's departure, Special Agent Richard K. Berry observed a man retrieve the package Mr. Lutzen had placed under the taxicab. Berry and other special agents of the FBI followed the man on foot until they saw him enter an apartment building located at 14-16 Mount Hope Place in the Bronx (Tr. 451-52, 496-97).

When the passenger returned to the room, Miss Lutzen asked him if he had picked up the money and he told her he had. Later that afternoon, he told her she was going home. The blindfold was removed, but the wool cap was kept down over her eyes. The passenger gave Miss Lutzen what he told her was a twenty dollar bill, and also told her she was going to take a taxi home. He then walked with her out of the building and onto the street (Tr. 97-100).

At approximately 2:15 P.M., Special Agent Berry, who was hiding in an alley a short distance from 14-16 Mount Hope Place, observed the same man he had seen retrieve the ransom money earlier that day. The man was walking with and holding a girl who had a cap pulled down over her nose. Berry walked up behind them and placed the man under arrest, while two other agents grabbed the girl, Kathleen Lutzen. The man was later identified as Hector Luis Pereira. Upon his arrest, Pereira was searched and $982 in cash was found on his person (Tr. 497-99; GX 16). It was determined from

the serial numbers of the bills that $980 of that amount was from the ransom money paid by Warren Lutzen (Tr. 523-24).

After her rescue, Miss Lutzen gave to an agent the twenty dollar bill she had been given; that bill was also part of the ransom money paid by Mr. Lutzen (Tr. 523). That evening, Miss Lutzen was examined by a doctor at New York Hospital, who found bruises and reddened areas on her right arm, right hip, neck and upper chest; abrasions on and swelling of her lips; a laceration at the back of her throat; and an inflamed area between her rectum and vagina (Tr. 311-13). She also gave to the FBI that day the wool cap that had been pulled over her eyes and the clothing she was wearing (Tr. 116-17). The clothing was subsequently examined at the FBI laboratory in Washington, D. C., and human blood and a semen stain were found on Miss Lutzen's cap; human blood was found in the crotch area of the jeans she had been wearing;* and semen stains were found on the front and human blood on the back of the shirt she had been wearing (Tr. 553, 555-6, 558, 559).** Miss Lutzen also identified Room 2E1 at 14-16 Mount Hope Place as the room where she had been held captive (Tr. 102).

At 6:35 P.M. on the evening of January 14, 1976, special agents of the FBI, under the supervision of Special Agent Berry, entered room 2E1 at 14-16 Mount Hope Place to execute a federal search warrant they had pro-

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* Miss Lutzen was having her menstrual period when she was kidnapped, and it could not be determined scientifically whether or not that was the cause of any blood stain (Tr. 560-61).

** The amounts of human blood found on the articles examined were too small to permit grouping as to blood type.

cured.* Among the items seized from the room during the search was the two pairs of jeans Miss Lutzan was carrying to her friend's house when she was kidnapped; a pair of gloves Miss Lutzen was wearing; the scarf she was wearing and which was later used to wipe blood from her mouth; the towel that was used to blindfold Miss Lutzen; a sheet from the bed in the room; and the coat Pereira had been wearing when he picked up the ransom money (Tr. 119-24; 500-11). When subsequently examined at the FBI laboratory, human blood was found on the bedsheet, the towel, the scarf, and one of the pairs of jeans, and semen was found on the coat (Tr. 554-55, 556-59). Also seized from the room were the pieces of

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* At a pretrial hearing on Lind's motion to suppress all evidence seized from room 2E1, Berry testified that when Miss Lutzen was rescued, she told the agents there was another kidnapper and that she had been kept in a room on the first floor of the building. She also told them there was a radio playing and a broken chair on the floor in the room. Berry met the superintendent of 14-16 Mount Hope Place, and walked with him through the halls of the building's first floor. Music could be heard playing in one room, 2E1. When a knock on the room's door brought no response, the agents asked the superintendent to open the door with his key. Immediately upon the door being opened, the agents could see a broken chair on the floor in the room. Berry and several other agents entered the room for no more than three or four minutes to make sure no one was hiding in a closet. Satisfied there was no one in the room, the agents withdrew from the room and locked its door. Berry posted three men in the hallway outside the room and waited for a search warrant to be obtained. When it was obtained several hours later, Berry and other special agents re-entered room 2E1 and began searching it (March 3, 1976, Pretrial Hearing Tr. 39-43).

At the conclusion of the pretrial hearing, Judge Stewart orally denied the motion to suppress evidence seized during the search of room 2E1 (March 3, 1976, Pretrial Hearing Tr. 68), and supplemented his decision in a written memorandum filed on March 31, 1976. Lind does not challenge that ruling on this appeal.

the chair that was smashed during Miss Lutzen's struggle with the driver (Tr. 114, 500); a .38 caliber revolver; a portable radio; a subway map; three picture frames; two empty gin bottles; and a pair of pants with $980 in cash in one pocket (Tr. 511-18, 521-22). From the serial numbers on the bills, it was determined that the $980 was part of the ransom money paid by Warren Lutzen (Tr. 524). The revolver subsequently was examined for fingerprints and no identifiable fingerprints were found on it (GX 31). The portable radio, subway map, picture frames and gin bottles were found to bear the fingerprints of Pedro Lind (Tr. 533-42).

B. Pedro Lind's Surrender and Confession

In January 1976, Pedro Lind worked part-time for Jose Ocana, a self-employed truck driver whom Lind had known for approximately three years. In December 1975, Ocana had helped Lind obtain room 2E1 at 14-16 Mount Hope Place, and Ocana partly paid Lind for the work he did for Ocana by paying the rent on the room (Tr. 569-71, 647). To Ocana's knowledge, no one other than Lind lived in room 2E1 in December 1975 or January 1976 (Tr. 571).

On Friday evening, January 16, 1976, Ocana saw Lind at a restaurant that Ocana frequented in the Bronx. Ocana had not seen Lind for six or seven days, and Lind had cut his hair and shaved his mustache in the interim. Lind, who appeared nervous, told Ocana he had cut his hair earlier that day. He told Ocana that he and his friend Hector had stolen a car to go to Lorain, Ohio, to see Lind's mother. They lost their way in New Jersey, however, and stopped to ask a girl for directions. Hector spoke to the girl in English, and Lind did not understand what they were saying.* Suddenly, Hector pulled out a

*Lind speaks very little English (Tr. 571).

gun and forced th[illegible] into the car so she could guide them to the Geor[illegible]shington Bridge (Tr. 573-78). As they approached the bridge, Hector told Lind, who was driving, that there was "money involved here," and Lind replied that if there was money involved "let's go on with it." (Tr. 579) Lind continued the story by telling Ocana that he and Hector took the girl to room 2E1 at 14-16 Mount Hope Place. They asked the girl for her home telephone number, and Hector went outside and called her parents while Lind stayed with the girl. When Hector returned to the room, he told Lind they would have to wait until the morning. The next day, Hector again went out, picked up the money and, when he returned to the room, gave Lind $1000 (Tr. 579).

Lind told Ocana that Hector and the girl were caught outside the apartment building. Of the $1000 Hector had given him, Lind took twenty dollars and left the remaining $980 in a pair of trousers in his room. He then went outside and drove the car for a short distance before abandoning it. Lind went to the apartment where Hector's wife lived and told her what had happened, but he did not trust her so he left. He did not tell Ocana where he went after that (Tr. 580).

Lind stated that he had cut his hair and mustache because the FBI was looking for him, and that he had to get out of the state and go west where they would not find him. Ocana, however, persuaded Lind to turn himself in to the FBI. They met at the same restaurant on Sunday, January 18, and after they both ate lunch, Ocana called an FBI agent he had spoken with after Lind told him his story, and made arrangements for Lind to surrender at the FBI's Manhattan offices that afternoon (Tr. 581-82, 604-12).

Lind and Ocana arrived at the FBI offices at approximately 1:30 P.M. Soon thereafter, Special Agent

Harold W. Gossett, who is rated by the FBI as a Spanish-speaking agent, advised Lind that he had certain constitutional rights and had him read and asked him to sign an advice of rights form that was printed in Spanish. Lind read the form, said he understood it, and signed it. As is his practice, Gossett then specifically explained to Lind certain of his constitutional rights—the right to silence, the right to an attorney, the right to stop answering questions and to answer only those questions that he chose to answer. Lind said he understood everything, and that he did not want an attorney at that time (Tr. 653-56, 688).

Lind was fingerprinted, photographed and strip searched, and then brought into an office at approximately 2:20 P.M. with Ocana, Special Agent Gossett, and two other FBI agents. After Lind answered a few background questions, Gossett told him he was going to ask him about the kidnapping of Miss Lutzen. Gossett again reminded Lind that he was not required to make a statement, but Lind stated that he wished to do so and that he did not want a lawyer (Tr. 656-5[illegible]).

The statement Lind made * was essentially the same story he had told Ocana, but with more details. Indeed, his narrative included virtually all the events to which Lutzen testified at trial. Lind also stated that while he was hiding, everyone looked to him like a policeman and he was constantly afraid. He finally surrendered to the FBI because he could no longer stand being a fugitive (Tr. 658-665).

Lind finished making his oral statement at approximately 6:45 P.M., at which time the agents had sand-

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* Gossett had very little difficulty communicating with Lind in Spanish. Lind occasionally used an idiomatic word with which Gossett was unfamiliar, but Ocana, who is bilingual, explained such words to Gossett (Tr. 652-53).

wiches and soft drinks brought in for everyone (Lind had been offered food earlier, but had declined it). At approximately 7:30 P.M., Gossett began preparing a written statement on the basis of what Lind had told him and with Lind's assistance. Ocana was present throughout. As Gossett finished a page he would give it to Lind to read. Lind initialed all cross-outs, pointed out mistakes that Gossett made, initialed each page, and signed the statements (Tr. 667-72).*

Lind identified a photograph of Kathleen Lutzen as being a photograph of the girl he and Hector had kidnapped, and photographs of Hector Pereira as being photographs of his friend Hector (Tr. 672-73). The FBI agents also had two photographs taken of Lind displaying his left hand with the scar where Kathleen Lutzen had bit him (Tr. 673-77; GX 36A, 36B). At 9:55 P.M., Lind was taken to the Metropolitan Correctional Center (Tr. 710).

The defendant offered no evidence.

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* Gossett prepared two statements, one that mentioned Hector and one that did not. At the pretrial hearing on Lind's motion to suppress the post-arrest statement he made to the FBI, Gossett testified essentially as he did at trial about the circumstances surrounding the statement. At the conclusion of that hearing, Judge Stewart denied the motion (March 3, 1976, Pretrial Hearing Tr. 118). At the close of the Government's case at trial, Lind renewed his motion and additionally moved to suppress the statement he had made to Ocana. Judge Stewart denied the motions (Tr. 737-41).

ARGUMENT

POINT I

The district court's limitations on the cross-examination of the kidnap victim were proper.

Prior to trial, Lind obtained the records of the Paramus, New Jersey, Police Department concerning Kathleen Lutzen, the kidnap victim. The records indicated that Miss Lutzen had in the past been involved in three incidents with the police:

(1) In 1971, when she was twelve years old, Miss Lutzen ran away from home for three days. She was not charged by the police with any offense.

(2) Another record, dated August 2, 1974, bore the notation: "D.P. [disorderly person] alcohol." Miss Lutzen apparently was reprimanded by the police and released, and was not charged with any offense.

(3) A third record, dated April 10, 1975, bore the notation: "D.P. [disorderly person]/Hitch-hiking/O.M.U. F.P. [obtaining money under false pretenses]." Miss Lutzen, however, was never formally charged, convicted or adjudicated of being a disorderly person or of hitchhiking. She was adjudicated a juvenile delinquent on the basis of her forgery of a forty dollar check. Miss Lutzen was placed on probation and ordered to make restitution, and the records of the juvenile court proceedings were sealed pursuant to the law of the state of New Jersey (Tr. 25-28, 44; March 15, 1976, Pretrial Conference Tr. 13).*

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* Lind implies in his brief that the Government failed to live up to its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), because it did not inform him of Miss Lutzen's contacts with the Paramus Police Department. The Government, how-

[Footnote continued on following page]

Judge Stewart prohibited defense counsel from cross-examining Miss Lutzen about her running away from home in 1971, as the incident was too remote in time, and also barred as irrelevant to the charges against the defendant cross-examination about the alleged "disorderly person-alcohol" incidents and her juvenile adjudication based on a check forgery. He permitted defense counsel to question Miss Lutzen about her episodes of hitchhiking, but not about any arrest she may have had for hitchhiking if that arrest did not result in a conviction or an adjudication of juvenile delinquency based on hitchhiking (Tr. 46-47, 129-34). The district court's rulings were correct.

Lind contends that he should have been permitted to cross-examine Miss Lutzen on all the incidents noted in the police records "to show that she had the trait of being a runaway and . hitchhiker under Rule 404[a][2] of the Federal Rules of Evidence. . . ." (App. Br. at 8). Rule 404(a)(2) states:

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ever, did inform defense counsel prior to trial of the only criminal or quasi-criminal charge ever brought against Miss Lutzen, the juvenile delinquency adjudication based upon the check forgery. See March 15, 1976, Pretrial Conference Tr. 13. The other police records described in the text were not in the possession of the Government. The records were obtained by defense counsel through the investigator appointed by the Court to assist him, and the Government was not aware of the incidents referred to in these records before defense counsel showed the records to the Government and the Court during the trial (Tr. 10-16). See *United States* v. *Romano*, 516 F.2d 768, 770 (2d Cir.), *cert. denied*, 423 U.S. 994 (1975); *United States* v. *Ruggiero*, 472 F.2d 599, 604-05 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). Moreover, since, as discussed in the text, the contacts with the police set forth in these records were not proper subjects of cross-examination of Miss Lutzen, the records could hardly be characterized as exculpatory. See *United States* v. *Agurs*, — U.S. —, 44 U.S.L.W. 5013 (June 24 1976).

"(a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

. . . .

"(2) Character of victim.—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor . . . ."

The basic crime charged against Lind was kidnapping. The defense apparently sought to show that Miss Lutzen was not kidnapped but, rather, willingly took a ride with Lind and Hector.* The fact that Miss Lutzen may have been "disorderly" in the past (an offense for which she was not only never convicted or adjudicated a juvenile delinquent, but for which she apparently was never charged in a formal instrument) or forged a check is not evidence of a character trait of hers pertinent to such a defense or any other conceivable defense to the crime of kidnapping. Indeed, the mere fact of

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* It is of interest that neither the story that Lind told to his friend, Jose Ocana, nor the statement he gave to the FBI supports such a theory. In both insances, Lind confirmed Miss Lutzen's account that she was not hitchhiking but, rather, was stopped by the defendants as she was walking, was asked directions to New York City and then was forced into the car at gunpoint and abducted. In the affidavit he submitted in support of his motion to suppress his confession, Lind did not deny the accuracy of or otherwise contradict those statements, nor did he do so at any other time in the court below.

an arrest is not evidence of any fact at all other than of the arrest itself. See *Michelson* v. *United States*, 335 U.S. 469, 482 (1948); *United States* v. *Acarino*, 408 F.2d 512, 515 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969); *United States* v. *Aguillar*, 387 F.2d 625, 626 (2d Cir. 1967). Similarly, the fact that Miss Lutzen may have run away from home for a short time when she was twelve years old is not probative evidence that she had the character trait of being a "runaway" almost five years later, when the events charged in the indictment occurred.

"The district judge has broad discretion in restricting the scope of cross-examination." *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975); see *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). It is within his discretion to proscribe examination into matters that are unduly prejudicial, may confuse the issues or mislead the jury, waste time, and harass or unduly embarrass the witness. See Fed. R. Evid. 403, 611(a); cf. Fed. R. Evid. 608(b). Here, the trial judge permitted defense counsel to inquire of the victim about the facts underlying the sole incident described in the polic records that arguably indicated a character trait pertinent to the kidnapping charge: her hitchhiking in 1975.*

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* The fact that she may have been *arrested* for hitchhiking—but never convicted or adjudicated a juvenile delinquent because of hitchhiking—was irrelevant and could only have been used to attempt to prejudice the jury against Miss Lutzen because she had had a run-in with the law. Judge Stewart therefore acted well within his discretion in permitting defense counsel to cross-examine Miss Lutzen about her hitchhiking but not about whether she had been arrested for hitchhiking.

Defense counsel cross-examined Miss Lutzen extensively about her hitchhiking prior to the evening of January 13, 1976, and as to whether or not she was hitchhikng on the evening of her abduction (Tr. 142-51, 159-71). Defense counsel also argued forcefully in his summation that Miss Lutzen was hitchhiking on the evening of January 13, 1976, and willingly went with Lind and Pereira (Tr. 776-78, 791). Moreover, Miss Lutzen was extensively cross-examined for approximately one full day.* Lind was not prejudiced by being denied additional cross-examination of Miss Lutzen on incidents not pertinent to the crimes charged or the defense Lind sought to establish, and which would have served no purpose but to prejudice or mislead the jury, and harass and unduly embarrass Miss Lutzen. Particularly in view of the cumulative nature of the additional questions Lind wished to ask, see *United States* v. *Pocelli*, 521 F.2d 135, 137-40 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), the trial judge acted well within his discretion in limiting the cross-examination.

Lind also argues that cross-examination of Miss Lutzen about the incidents in the police records should have been permitted under Rule 609(d) of the Federal Rules of Evidence, although at trial defense counsel specifically denied that he was relying on that rule to support his proposed cross-examination (Tr. 42). Rule 609(d) states:

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* Among the areas probed on cross-examination was whether Miss Lutzen was kicked out of her house by her father on the evening of the kidnapping (Tr. 377). In addition, defense counsel questioned Miss Lutzen's father about his daughter's hitchhiking, the amount of freedom he permitted her to have, and other aspects of her past behavior (Tr. 458-69), and commented in his summation on Miss Lutzen's character and home background (Tr. 775-78, 780-82, 791).

> "Evidence of juvenile adjudications is *generally not admissible* . . . . The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if . . . the court is satisfied that admission . . . is necessary for a fair determination of the issue of guilt or innocence." (emphasis added)

Thus, of the incidents about which Lind sought to cross-examine Miss Lutzen, the only one to which Rule 609(d) is applicable is her juvenile adjudication for forging a check.

While Rule 609(d) does alter the common law rule * slightly by vesting the trial judge with a certain amount of discretion in permitting the admission of evidence of a juvenile adjudication,

> "policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications."

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* The universally accepted common law rule was that a juvenile adjudication was not admissible to impeach a witness. The twofold and still viable rationale for this rule was that a juvenile adjudication is not a conviction, and that to admit evidence of it would be contrary to the policy of juvenile offender statutes, namely, to prevent the juvenile from being stigmatized and to encourage his rehabilitation. See *Cotton* v. *United States*, 355 F.2d 480, 481 (10th Cir. 1966); *Brown* v. *United States*, 338 F.2d 543, 547 (D.C. Cir. 1964); *Price* v. *United States*, 282 F.2d 769, 771 (4th Cir. 1960), *cert. denied*, 365 U.S. 848 (1961); C. McCormick, *Evidence* § 43 at 86 (2d ed. 1972); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 609[05] at 609-85 (1975). The Second Circuit recently reaffirmed these principles. *United States* v. *Canniff*, 521 F.2d 565, 569-70 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976).

Advisory Committee's Note to Rule 609(d), 56 F.R.D. 183, 272 (1972).*

Furthermore, New Jersey, the state where the witness resides and was adjudicated a juvenile offender, has a very strong policy of protecting juvenile offenders and encouraging rehabilitation by maintaining confidentiality of juvenile adjudications.** N.J. Stat. Ann. 2A: 4-64

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* Similarly, Judge Weinstein, after noting that 609(d) "represents a departure from previous practice," concludes:

> "The primary reason for excluding juvenile adjudications remains extant. The enactment of juvenile offender statutes is 'founded upon strong social policy and their aim is amnesty and oblivion for the transgressions of youthful offenders. The fundamental philosophy of the juvenile court laws is that a delinquent child is to be considered and treated not as a criminal but as a person requiring care, education and protection. He is not thought of as 'a bad man who should be punished, but as an erring or sick child who needs help.' Thus, the primary function of juvenile courts, properly considered is not conviction or punishment for crime, but crime prevention and delinquency rehabilitation . . . . There is no more reason for permitting [impeachment by juvenile adjudication] than there would be to pry into school records or to compile family and community recollections concerning youthful indiscretions of persons who were fortunate enough to avoid the juvenile court.'"

3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 609[05] at 609-84, 609-85 (1975), *quoting Thomas* v. *United States*, 121 F.2d 905, 907-09 (D.C. Cir. 1941). Judge Weinstein further concludes that the Federal Rules of Evidence should not be interpreted as allowing admission of the underlying acts if the adjudication itself is inadmissible. 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 609[05] at 609-87, 609-88; cf. *United States* v. *Cauniff*, 521 F.2d at 570 & n. 4.

** While New Jersey law is not controlling, it is relevant to determination of the operative policies favoring or disfavoring admissibility of juvenile adjudications. Thus, while New York

[Footnote continued on following page]

(Supp. 1976) states:

> "No disposition under this act shall operate to impose any of the civil disabilities ordinarily imposed by virtue of a criminal conviction, nor shall a juvenile be deemed a criminal by reason of such disposition.
>
> "The disposition of a case under this act shall not be admissible against the juvenile in any criminal or penal case or proceeding in any other court except for consideration in sentencing."

In addition, N.J. Stat. Ann. 2A: 4-65 (Supp. 1976) provides in part:

> "a. Social, medical, psychological, legal and other records of the court and probation department, and records of law enforcement agencies, pertaining to juveniles charged under this act, shall be strictly safeguarded from public inspection."

See *State* v. *De Paola*, 5 N.J. 1, 73 A.2d, 564, 573 (1950); *State* v. *Brown*, 132 N.J. Super. 584, 334 A.2d 392 (1975); cf. *In re Steenback*, 34 N.J. 89, 167 A.2d 397, 404 (1961); *Kozler* v. *New York Telephone Co.*, 193 N.J.L. 279, 108 A. 375 (Sup. Ct. 1919).

The District Court acted well within its discretion under Rule 609(d) by not permitting Lind to override the interest of the State of New Jersey (which corresponds

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law was not controlling in *United States* v. *Canniff*, 521 F.2d at 568-70, the Second Circuit nonetheless examined and weighed the policies underlying the New York statute prohibiting impeachment by juvenile adjudications in deciding that a New York State youthful offender adjudication was not admissible for impeachment purposes in federal court.

to the federal interest as delineated in *United States* v. *Canniff*, *supra*) in protecting and rehabilitating its juvenile offenders by maintaining confidentiality of juvenile adjudications. *Davis* v. *Alaska*, 415 U.S. 308 (1974), relied on by Lind, is not to the contrary. In *Davis*, the Court held that the defendant should have been permitted to cross-examine a government witness concerning his juvenile record where the witness' juvenile "record would be revealed only as necessary to probe [him] for bias and prejudice *and not generally* to call [his] character into question." *Id.* at 311 (emphasis added). See *State* v. *Brown*, 132 N.J. Super. 584, 334 A.2d 392 (1975).

Lind contends that he sought to cross-examine Miss Lutzen on her juvenile adjudication "not to attack her general credibility, but . . . to show bias and prejudice [and] motive or other state of mind to wit: that she would lie concerning the fact that she was hitchhiking so as to avoid being institutionalized or sent to juvenile center or reform school and to avoid the wrath of her parents and school officials and to avoid other possible disciplinary measures." (App. Br. at 10) Defense counsel, however, was permitted to cross-examine Miss Lutzen extensively about her hitchhiking. Her juvenile adjudication for forging a check bears no rational relationship to Lind's "hitchhiking" defense or to any aspect of Miss Lutzen's testimony or the charges against Lind. The only purpose that would have been served by cross-examining Miss Lutzen about her juvenile adjudication

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* Justice Stewart's concurrence was based upon this narrow reading of *Davis*. He stated:

> "In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the *general credibility* of a witness through cross-examination about his past delinquency adjudications. . . ." 415 U.S. at 321 (emphasis added).

would have been to impeach her general credibility, a purpose that is proscribed by *Davis* and Rule 609(d). Judge Stewart acted well within his discretion under Rule 609(d) and in accord with prior law.

In sum, Lind was permitted to cross-examine Miss Lutzen extensively and to develop his "hitchhiking" defense. The limitations that were imposed on Lind's cross-examination of Miss Lutzen were proper under Rules 404(a)(2) and 609(d), and were well within the trial judge's discretion.

POINT II

The admission into evidence of Lind's post-arrest confession was proper.

Lind contends that the district court erred in not granting his motion, made prior to trial and renewed at the close of the Government's case, to suppress the statement he made to the FBI on the grounds that he did not knowingly and intelligently waive his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and that the statement was not voluntary. This argument is meritless.

The evidence at both the pretrial suppression hearing and at trial showed that Lind, accompanied by his friend, Jose Ocana, voluntarily surrendered at approximately 1:30 P.M. on Sunday, January 18, 1976, at FBI headquarters in Manhattan. He was immediately placed under arrest for the January 13, 1976 kidnapping of Kathleen Ann Lutzen, and was advised in Spanish of his constitutional rights. Lind stated he understood his rights, and signed a form in Spanish in which he acknowledged that he understood and waived his rights (GX 34). Certain of his rights, including his rights to

silence and to an attorney, were then re-emphasized and explained to him, and Lind again stated he understood them.

After being processed, Lind was interviewed in Spanish beginning at about 2:20 P.M. When the agent finished asking Lind questions about his background and told Lind he wanted to ask about the kidnapping, the agent reminded Lind he did not have to make a statement, but Lind stated he did not want a lawyer and began talking about the Lutzen kidnapping. Lind told his lengthy story until about 6:45 P.M., when he was brought sandwiches and coffee.* From about 7:30 P.M. to about 9:50 P.M., the lengthy oral confession that Lind had given that afternoon was reduced to writing in Spanish. The defendant read each page, making corrections, initialing parts that were crossed out, and initialing each page. Two written statements were made, and the defendant signed both. At about 9:50 P.M. he was transported to the Metropolitan Correctional Facility, and was arraigned on a complaint the next morning, Monday, January 19.

During the period of his interview, the defendant never asked for a lawyer and never asked that the questioning be stopped, although he had been carefully advised of his constitutional rights and stated he understood them (March 3, 1976, Pretrial Hearing Tr. 89-90; Tr. 677). He never asked for food or drink during the questioning, and never stated that he needed sleep (March 3, 1976, Pretrial Hearing Tr. 90-91). No false promises or trickery

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* Lind had been offered food earlier and declined it and Ocana testified that—contrary to Lind's statement (in his affidavit in support of his motion to suppress) that the meal that evening was "the only real food I had had for three days" — he and Lind had eaten lunch together before they went to FBI headquarters (Tr. 582).

were used to induce his confession, and no threats were made to him or shouts directed at him (March 3, 1976, Pretrial Hearing Tr. 91; Tr. 586-87, 677). Indeed, he was accompanied by his friend throughout the questioning. The length of the interrogation under the circumstances here—where much of the time was spent merely committing to writing the lengthy oral statement Lind initially gave—was not "prolonged" interrogation as that phrase has been used by the courts. See *United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 45, 51 (2d Cir. 1975); *United States ex rel. Coleman* v. *Mancusi*, 423 F.2d 985, 987 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970); *United States* v. *Curry*, 358 F.2d 904, 912-13 (2d Cir. 1965), *cert. denied*, 385 U.S. 873 (1966). The Government fully complied with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and under all the circumstances Lind's confession was clearly voluntary. See *United States* v. *Vigo*, 487 F.2d 295, 298-99 (2d Cir. 1973).; *United States* v. *Ortega*, 471 F.2d 1350, 1362 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States* v. *Collins*, 462 F.2d 792, 795-97 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States* v. *Marrero*, 450 F.2d 373, 376-77 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); *United States* v. *Lopez*, 450 F.2d 169, 170 (9th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972); *Frazier* v. *United States*, 419 F.2d 1161, 1166-67 (D.C. Cir. 1969); *United States* v. *White*, 417 F.2d 89, 91-92 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *O'Neal* v. *United States*, 411 F.2d 131, 136-37 (5th Cir.), *cert. denied*, 396 U.S. 827 (1969); *Reinke* v. *United States*, 405 F.2d 228, 229-30 (9th Cir. 1968). Compare *United States ex rel. Lewis* v. *Henderson*, 520 F.2d 896, 900-902 (2d Cir.), *cert. denied*, 423 U.S. 998 (1975). The district court's finding that Lind's statement was voluntary and that he knowingly and intelligently waived his rights were not clearly erroneous and should not be disturbed. See

United States v. *Lucchetti*, 533 F.2d 28, 36 (2d Cir. 1976); *United States* v. *DuVall*, Dkt. Nos. 75-1225, 75-1335 (2d Cir. Feb. 26, 1976), slip op. at 2136-37.*

POINT III

The evidence of Lind's guilt was sufficient.

Lind asserts that the evidence was insufficient to establish his guilt of the charges in the indictment, primarily because Miss Lutzen was not permitted to identify Lind before the jury as one of her kidnappers. This argument is utterly frivolous.

Miss Lutzen was held captive in Lind's room at 14-16 Mount Hope Place. Between the time of the kidnapping and his surrender, Lind tried to change his appearance

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* The district court's ruling is especially justified since Lind, in his affidavit in support of his motion to suppress, did not deny the accuracy of his post-arrest statement, nor did he take the stand at the pretrial suppression hearing and do so. If Lind's statement was not voluntarily made, it would seem to follow logically that it was not true, and the absence of any denial by Lind of the statement's truth tends to make his voluntariness claim ring hollow.

In addition, Ocana testified at trial that Lind made virtually the same statement to him about the kidnapping as he made to the FBI after his arrest. Lind does not attack the admission of that statement on this appeal, and properly so as it was a pre-arrest admission by Lind to a person who was not a government agent. That statement again refutes Lind's claim that his later, virtually identical statement to the FBI was not voluntary, particularly since Lind, at Ocana's suggestion, surrendered himself to the authorities. Moreover, even assuming *arguendo* that Lind's post-arrest statement should have been suppressed, the jury still would have had before it the virtually identical statement Lind made to Ocana.

by cutting his hair and shaving off his mustache. When he surrendered, Lind had a scar on his hand which he admitted—and which the jury was justified in finding apart from his admission—was from the bite Miss Lutzen inflicted on him when he stuck his hand down her throat. Most importantly, Lind made a detailed confession to both Ocana and the FBI that totally corroborated Miss Lutzen's account of the kidnapping and which in turn was corroborated by other evidence, such as the $980 from the ransom money that was found in the pocket of a pair of pants in Lind's room.

In short, the jury had before it powerful evidence "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); see *United States* v. *DeGarces*, 518 F.2d 1156, 1159-60 (2d Cir. 1975).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

DANIEL L. FINEMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of September, 1976 he served a copy of the within Appellate Brief by placing the same in a properly postpaid franked envelope addressed:

Martin E. Gotkin, Esq.
250 W. 57th Street
New York, NY 10019

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing within the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Daniel L. Fineman

Sworn to before me this

15th day of September, 1976.

Mary L. Avent
NOTARY

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977